TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1112.

FREDERICK HOPT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 21, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 1112.

FREDERICK HOPT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original.	Print.
Indictment	1	1
Arraignment and plea	3	1
Assignment of counsel	4	2
Instructions of court to petit jury	5	2
Defendants' request No. 4	12	4
Defendants' request No. 5	13	4
Instruction on intoxication	12	4
Verdict	25	8
Bill of exceptions	26	9
First affidavit of accused for continuance	27	9
Motion for continuance	35	11
Second affidavit of accused for continuance	35	12
Affidavit of counsel for continuance	42	14
Examination of juror William Schade	45	15
Challenge of juror M. Queen	47	15
Testimony of T. J. Carr	48	16
Assignment of errors in Utah supreme court	53	17
Facts admitted	55	18
Motion for new trial	61	19
Order denying new trial	62	19
Judgment and sentence	63	19
Appeal notice	64	20
Certificate of clerk of district court	65	20
Hearing in Utah supreme court	67	21
Judgment in Utah supreme court	68	21
Writ of error	69	22
Citation	71	22
Assignment of errors United States Supreme Court	73	23
Certificate of assignment of counsel	77	24
Affidavit of pauperism of accused	78	25
Certificate of clerk to record	80	25

1 TERRITORY OF UTAH:

In the third judicial district court.

THE PEOPLE OF THE TERRITORY OF UTAH } Murder in the first
vs. } degree.
FRED. WELCOME & JACK EMERSON.

Fred. Welcome and Jack Emerson are accused by the grand jury of this court, by this indictment, of the crime of murder in the first degree, committed as follows: The said Fred. Welcome and Jack Emerson, on the 3d day of July, 1880, at the county of Summit, in said Territory, with force and arms, and with some deadly instruments and weapons, to the grand jury unknown, feloniously, willfully, deliberately, and of their malice aforethought, and premeditatedly did make an assault in and upon one John F. Turner, and with said deadly instruments and weapons did then and there feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought mortally wound said John F. Turner, in and upon the side of his head and face, of which said wound the said John F. Turner did then and there die; and the grand
2 jury aforesaid do say and charge that the said Fred. Welcome and Jack Emerson, in the manner and form aforesaid, feloniously, willfully, deliberately, maliciously, premeditatedly, and of their malice aforethought did kill and murder, contrary to the form of the statutes of said Territory in such case made and provided, and against the peace and dignity of the people aforesaid.

JOHN CUNNINGTON,
Foreman of the Grand Jury.

JAS. H. BEATTY,
Ass't U. S. Att'y, &c.

(Endorsed:) 4635. In 3d dist. court of Utah. The people, &c., vs. Fred. Welcome and Jack Emerson. "Murder."

A true bill.

JOHN CUNNINGTON,
Foreman.

Witnesses: Charles E. Bates, Thomas J. Stilfox, Thomas Fowler, John W. Turner, David Moore, J. F. Benedict, E. M. Allison, A. J. Moore.

Presented in open court by the foreman of the grand jury, in its presence, and by me filed this 14th day of December, 1880. O. J. Averill, clerk, by H. G. M. Millan, deputy clerk.

Dec. 14th, 1880, issued warrant.

Dec. 17, 1880, def'ts arraigned and say they do not desire the
3 court to appoint counsel.

Def't Fred. Welcome says his true name is Frederick Hopt, and def't Jack Emerson says his true name is Jack McConnell; & each plead "not guilty."

Feb'y 16, 1881, jury empannelled to try def't Hopt.

Feb'y 19th, filed and entered verdict "guilty" as to def't Hopt.

M'ch 28, 1881, motion of def't Hopt for new trial overruled.

April 4th, def't Hopt sentenced to be shot.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FRED. WELCOME AND JACK EMERSON.

4635. Indictment for murder in the first degree.

On this day the defendants are arraigned at the bar in open court, in due form of law. Def't Fred. Welcome says his true name is Frederick Hopt; def't Jack Emerson says his true name is John McConnell, and they each say they do not desire the court to appoint counsel for himself at the present time, and each defendant demands a separate trial, and each defendant pleads to said indictment "not guilty," and the prisoners are each remanded to the custody of the U. S. marshal.

Dec'r 17, 1880.

JOHN A. HUNTER, *Judge.*

4 THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT AND JOHN MCCONNELL.

Murder in the first degree.

The said defendants are now brought before the court, and each now requests the court to appoint counsel for him, and the court appoints J. A. Marshall and L. J. Sharp counsel for said defendant Frederick Hopt, and E. D. Hoge and H. F. Williams counsel for defendant John McConnell.

January 24th, 1881.

JOHN A. HUNTER, *Judge.*

5 TERRITORY OF UTAH:

In the district court for the third judicial district.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, IMPLEADED WITH JOHN McConnell.

By the COURT.

GENTLEMEN OF THE JURY: The defendant, Frederick Hopt, is on trial, charged with one of the gravest offences known to the law, and your position and duty in respect thereto is one of very great responsibility. The enforcement of the statutes against crime, in a manner that will most conduce to the welfare of the public, depends very largely upon the fidelity, intelligence, and moral courage of jurors. If, through a want of judgment, or of failing to appreciate the relation of their duties to the general good, or if, through extreme sensibility in view of the possible consequences of a conviction to the prisoner, they acquit the guilty, the laws against crime are thereby suspended, such a culpable
6 mistake would be an evil example to the whole class of depraved men inclined to crime. On the other hand, if, through inattention to the testimony, or by a careless and precipitate judgment, a jury pronounced an innocent man guilty, the wrong is no less serious. There is therefore no escape from your responsibility. I presume that not one of you ever had so great a responsibility resting on you before. I only caution you in this respect so you will be careful to do your duty on account of that responsibility. You must remember we are not here to make the laws. This is not a gov[illegible]nment of men but a government of

laws. What I say to you now is because I am required to give these instructions to you as a part of my duty under the law of the land. What you do, you do not do as men but as jurors under the law. We do not administer the law as we wish it was, nor perhaps as we would make it had we the making of it. The court has been sworn to administer the law as it finds it, and you should do the same thing. You should not shrink from your duty manfully and carefully. Your duty both to the respondent and the public demands it.

7 Under the statutes of this Territory I am required to instruct you that you are the sole judges of the facts of the credibility of the witnesses and of the weight of the evidence. By a statute of this Territory I am also required to charge you that "a defendant in a criminal action is presumed innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to an acquittal;" and, further, "when it appears that the defendant has committed a public offense, and there is reasonable grounds of doubt in which of two or more degrees he is guilty, he can be convicted of the lowest of such degrees only." So that it seems necessary that upon the very threshold of your investigation of the facts you should fully understand what the law means by a reasonable doubt, and when it may be said to fairly arise. It is easier to understand this then to define it. A reasonable doubt is such an one as would arise in the minds of reasonable men on any subject. Just such men as you

8 are, who are selected because you are reasonable, competent men to try such a question.

Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist—that the fact to be proven actually exists; such proof as produces an abiding conviction in the mind, of moral certainty that the fact exists, so that you feel certain that it exists. A balance of proof is not sufficient. In a civil case a balance of proof is sufficient. A balance of evidence is that which you think is most likely to have been the fact; the way your mind preponderates upon a question of fact that makes out a balance, but that will not answer here; you must go beyond that. There must be not only a balance of proof but there must be this full measure of proof which removes all reasonable doubt—all doubt that arises in your minds as reasonable and produces an abiding conviction to a moral certainty that facts charged exist. Proof beyond a probability of

9 doubt is not required because such proof never can be made. It is not to be shown to you that it is not possible that this respondent is innocent, to show beyond all probability of doubt that he is guilty, but it is required of the government to produce such evidence that when you look over as reasonable men, no doubt arises in your minds. There is no reasonable, fair doubt as to any fact necessary to be made but the crime charged upon the respondent. You will recollect that in rendering your verdict you do not, as is sometimes stated, swear that the defendant is either guilty or not guilty. The jury swear to no such thing; they declair in rendering a verdict the result of their minds, from the evidence produced, having sworn to give a true verdict according to the evidence. I have been thus particular in stating this to you to impress it upon your minds as the guide by which you are to be governed throughout the whole case in your investigation of the

10 facts. Before calling your attention to the alleged crime itself, it is proper that I should call your attention to another provision of our statutes because there is testimony in the case which seems to require it. It is as follows: "All persons concerned in the commission

of a crime whether it be felony or misdemeanor, and whether they directly commit the act constituting the offence, or aid and abet in its commission, or not being present, have advised and encouraged i's a commission are princip'les in any crime so committed."

With these general principles for your guide, I now call your attention to the alleged crime itself. The crime charged is that of murder in the first degree. Murder is defined in the statutes, as follows:

Read §§. 1917, 1918, 1919.

In deliberation there must be no appreciable space of time between the intention to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceeded by a concurrance of will, deliberation and premeditation on the part of the slayer; and if such is the case the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.

INTOXICATION.

Given by the COURT:

A man who voluntarily puts himself in a condition to have no control of his actions must he held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withall so inexcusable in itself, that law has never recognized it as an excuse for crime.

Read 12th' Nevada, page 149.

DEF'T'S 4TH INSTRUCTION.

Refused.

P. H. EMERSON, *Judge.*

In order to constitute a crime a person must have intelligence and capacity enough to have a criminal intent and purpose, and if his reason and mental powers are either so deficient that he has no will, no conscience, nor controlling mental power, or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

DEF'T'S 5TH INSTRUCTION.

Refused.

P. H. EMERSON, *Judge.*

Drunkenness is not an excuse for crime, but as in all cases, where a jury find a defendant guilty of murder they have to determine the degree of crime. It becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered where the homicide is not committed by means of poison, lying in wait, as torture, or in the perpetration or attempt to perpetrate arson, rape, robbery, or burglary. The degree of the offence depends entirely upon the question whether the killing was willful, deliberate, and premeditated, and upon

that question it is proper for the jury to consider evidence of intoxication, if such there be, not upon the ground that drunkenness ren-
14 ders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be enquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime.

DEF'T'S 7TH INSTRUCTION.

Refused.

P. H. EMERSON, *Judge.*

This case rests upon circumstantial evidence, and the jury are charged that each fact necessary to the conclusion of defendant's guilt must be distinctly and independently proved by competent evidence beyond a reasonable doubt. All the facts must be consistent with each other, and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature, and leading on the whole to a satisfactory conclusion, and producing in effect a moral
15 certainty that the accused and no other person committed the offence charged, and when a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with defendant's guilt, but inconsistent with any other rational conclusion. If the evidence in this case be (consistent) rec*i*eved either with the theory of innocence or guilt, the law requires the jury to give defendant the benefit of the doubt and to acquit.

By the COURT:

The prossecution in this case has introduced considerable circumstantial evidence in connection with more direct proof. Each kind of evidence is entirely legal and compet*a*nt and will sustain a conviction if it produces on the minds of the jury a belief beyond a reasonable doubt of the guilt of the accused. But each and every of the circumstances should be consist*a*nt only with the theory of guilt. All evidence is more or less circumstantial; the difference being in degree. It
16 is of a nature identical with direct evidence, the distinction being that by direct evidence is intended evidence which applies directly to the fact, which forms the subject of enquiry; circumstantial evidence is equally direct in its nature, but as its name implies, it is direct evidence of a min*e*r fact or facts incidental to or usually connected with some other fact as its accident, and from which such other fact is inferred. In order to convict, all the circumstances taken together must be sufficient to exclude all disbelief; that is, actual and not technical disbelief; for you who pass upon the question, are not at liberty to disbelieve as jurors, while as the result of the evidence in the case you believe as men; it is enough to convict that your consciences are clear and your judgment satisfied, beyond a reasonable doubt.

17 In the third judicial district court of the Territory of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER ANOTHER name.
} Murder in the first degree.

The defendant requests the court to instruct the jury as follows:

I.

Given.

P. H. EMERSON.

The defendant in this cause is indicted for murder in the first degree. Under this indictment the jury may find him guilty of murder in the first or second degree.

Murder is the unlawful killing of a human being, with malice aforethought, either express or implied, & this applies to both murder in the first and second degree, and if you find the defendant guilty of the murder alleged in the indictment, you must designate in your verdict whether it be murder of the first or second degree. The unlawful killing may be effected by any of the various means by which death may be occasioned. All murder which shall be perpetrated by means
18 of poison, or lying in wait, torture, or any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree, and all other kinds of murder, shall be deemed murder in the second degree.

The unlawful killing must be accompanied with a deliberate and clear intent to take the life; in order to constitute murder in the first degree the intent to kill must be the result of a deliberate premeditation, and must be found upon a pre-existing reflection.

2ND & 3RD.

Given, with addition in writing.

P. H. EMERSON, *Judge.*

If the jury find from the evidence that defendant inflicted the blow that caused the death of deceased; yet, unless they are satisfied beyond a reasonable doubt that the blow was given deliberately and premeditatedly, they cannot find him guilty of murder in the first degree.

19 By the term deliberate is meant that manner of the performance was determined upon after examination and reflection; that the consequences, chances, and means were weighed, carefully considered, and estimated. By the term premeditated is meant that the act was planned, contrived, or schemed beforehand.

(Read what is written after reference, to 8§.)

3RD.

Given in charge of court.

P. H. EMERSON, *Judge.*

The defendant is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal.

Being satisfied beyond a reasonable doubt means that there must be in the minds of the jury an abiding conviction to a moral certainty of the truth of the charge, derived from a comparison and consideration of the evidence. They must be entirely satisfied of the guilt of the accused.

20 DEFT'S 10TH INSTRUCTION.

Given as modified.

P. H. EMERSON, *Judge.*

The possession of the fruits and instruments of crime by the prisoner is a circumstance that the jury may consider; but to raise the presumption of guilt from that possession, it is necessary that they be found in the exclusive possession of the person charged.

It is proper that I should call your attention to another provision of the statute, §§ 1920.

By the COURT:

In conclusion, gentlemen, you can take all the evidence in the case, look it over with all the care of which you are possessed, and bring to it the best powers of the mind and the best judgment you have, with a stern desire to do your duty in regard to it. If you come to the determination that the respondent is guilty, convict him of what the evidence shows clearly he is guilty of; and if he is not guilty, or you have a reasonable doubt of his guilt, acquit him. I regret that it is so late in the day and in the week that you approach the examination of this case.

21 I trust that you will allow no matter of convenience to yourselves or to any other person to hasten you in your examination of the case. Take the evidence and look it all over and devote such time to it as you desire and as much time as is necessary in order that you carefully look this whole matter over and come to a conclusion in your own minds as to whether the respondent is guilty or not, and when you give your verdict be sure that you give such a verdict as is equally just to the respondent and the people of the Territory of Utah.

DEF'T'S 8TH INSTRUCTION.

Given.

P. H. EMERSON, *Judge.*

The evidence of verbal confessions of guilt isto be received by the jury with great caution. For, besides the danger of mistake from the misapprehension of witnesses, the misuse of words, the failure of the party to express his own meaning, and the infirmity of memory, it should be recollected that the mind of the prisoner is oppressed

22 by the calamity of his situation & that he is often influenced by motives of hope or fear to make an untrue confession. The confession is a mere circumstance & is to be considered as other circumstances in the case.

DEF'T'S 6TH INSTRUCTION.

Given.

P. H. EMERSON, *Judge.*

The burden of proof is upon the prosecution in this case; it does not shift in criminal cases, but upon the prosecution throughout to establish defendant's guilt beyond a reasonable doubt. You are not to find that defendant is properly suspected or that he is probably guilty or that there is a preponderance of evidence against him, but before you bring in a verdict of guilty you must find as a matter of fact beyond a reasonable doubt that the defendant committed the offense. The law clothes the defendant with the presumption of innocence which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt; which means that the evidence of his guilt must be clear, positive, and abiding, fully satisfying the minds and consciences of the jury.

23 It is not sufficient in criminal cases to justify a verdict of guilty that there may be strong suspicions or very strong probabilities of guilt nor a preponderance of evidence against the defendant, but what the law requires is proof by legal and credible evidence of such a nature that when it is all considered by the jury, giving to it its natural effect, they feel when they have considered it all a clear, undoubting, and entirely satisfactory conviction of defendant's guilt. They must be entirely satisfied of the guilt of the accused. If the defendant's guilt be thus proved the jury should find him guilty; if not they should acquit.

(Follow this from Magazine American Law Register, July, 1868, page 559.)

DEF'T'S 9TH INSTRUCTION.

Given in other charge.

P. H. EMERSON, *Judge.*

In arriving at their verdict the jury must consider all the facts and circumstances of the case. The jury are the exclusive judges of all the facts in the case and also of the credibility of the witnesses and may give that weight to the testimony of each and every witness after considering all the facts & circumstances of the case to which in their judgment they think it is entitled.

24 Filed Febr'y 19th, 1881. O. J. Averell, clerk; by Chas. H. Blandin, deputy clerk.

25 TERRITORY OF UTAH,
County of Salt Lake:

In the district court of the third judicial district.

THE PEOPLE OF THE TERRITORY OF UTAH, plaintiffs, *vs.* FREDERICK HOPT, INDICTED UNDER THE name of Fred. Welcome, impleaded with Jack Emeson, whose true name is John McConnell, defendant.	Indictment for murder in the first degree.

We, the jurors impanelled in the above-entitled cause, find the said defendant Frederick Hopt who was indicted under the name of Fred. Welcome, guilty of murder in the first degree.

M. G. ATWOOD, *Foreman.*

(Endorsed:) Verdict. Filed July 19th, 1881. O. J. Averill, clerk; by Chas. F. Blandin, deputy clerk.

26 *Bill of exceptions.*

In the district court of the third judicial district, Territory of Utah, county of Salt Lake.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER THE name of Fred. Welcome, impleaded with another.
} Indicted for murder in the first degree.

Be it remembered that on the 9th day of February, 1881, on the first calling of the criminal calender for the February term of said court, the United States district attorney on behalf of the people moved the court that the above-entitled cause might be set for trial on the 16th day of February, 1881; to which counsel for the respondent on behalf of said respondent objected and respectfully moved the court to continue said cause for the February term of said court, said motion being on an affidavit of which the following is a copy, on the grounds therein set forth.

TERRITORY OF UTAH,
County of Salt Lake, ss:

Territory of Utah, in the third judicial district court.

27 THE PEOPLE OF THE TERRITORY OF Utah.
vs.
FREDERICK HOPT, INDICTED UNDER NAME of Fred. Welcome.
} Indictment for murder in the first degree.

Affidavit for continuance on behalf of Welcome.

Frederick Hopt, being first duly sworn, on his oath states that he is the defendant indicted under the name of Fred. Welcome in the above-entitled cause; that he has fully disclosed his defense, so far as he knows the same, to his attorneys, and is advised by them, and believes it to be true, that he cannot safely go to trial in said cause at the present term of this court, for the reasons following, to wit:

That an indictment was found against said appliant by the grand jury of said court on the 14th day of December, 1880; that said appliant was arraigned on the same day, pleaded not guilty, and declined having counsel assigned for his defense, for the reason that he was then expecting his father to arrive at Salt Lake City for the purpose of, and with means sufficient to, employ counsel of the defendent's and his father's choosing; that appliant had previous thereto written to his father, informing him that he was confined to the Utah penitentiary upon the charge of murder, and was totally without means to employ counsel or prepare for his defense, and requesting his said father to come to his assistance; that appliant directed said letter to his father at New Ulm, in the State of Minnesota, his father's place of residence, and caused said letter to be posted, postage paid. That since appliant's arrest he has been constantly confined in the said penitentiary, and laterally without means to employ counsel or prepare for his defense, but that appliant's said father has ample means for said

28

purposes. That appliant was arrested about the 22nd day of July, 1880. That after some delay appliant received a letter from his mother acknowledging the receipt of said letter to appliant's father, and telling appliant that his father was then temporarily in the State of Oregon, and giving his then address; that immediately on appliant's receipt of said letter, appliant wrote to his said father, stating in substance the same matter set forth in said first letter to his said father, and directed said second letter to his father at the address sent him by his said mother, and caused said second letter to be posted, postage pre-
29 paid. That appliant has not yet heard from his said father, and believes that his father never received his said letter, but had changed his address before appliant's said letter reached said State of Oregon, or was at that time on his way back to his home in Minnesota. Affiant is satisfied that when his father hears of his condition he will hasten to his relief with sufficient means to employ counsel and to prepare for his defense. That on the 24th day of January, 1881, affiant fearing lest his said father might not arrive in time for the present term of this court, requested that temporary counsel might be assigned him, and the court thereupon assigned affiant temporary counsel. That affiant, on the same day as said assignment had a consultation with his said counsel, and that affiant fully and fairly stated to them this case, and all the matters appertaining to the defense thereof as fully as he could recollect the same, and that affiant has a good and substantial defense on the merits to the indictment in this action, as he is advised by his said counsel and verily believes; that at the time said alleged murder is alleged in said indictment to have been committed,
30 affiant was in a state of gross intoxication from the use of alcoholic liquors, and that affiant for a long time prior thereto was habituated to the excessive use of alcoholic liquor to the extent of rendering him habitually insane. And affiant further says that he cannot safely proceed to the trial of the above-entitled cause at the present term of court on account of the absence of William Root, Willie Johnson, & Peter May, & others whose names defendant does not now recollect, but thinks, if time is afforded him, he can ascertain them; all material witnesses on the part of affiant. That the present residence of said witnesses, or of any of them, is to affiant unknown, for the reason that affiant has been confined in the penitentiary since some time in the montn of July, 1880, and affiant is informed, and verily believes that said witnesses have since that time changed their places of residence, but affiant is informed and believes that said witnesses are still within the Territory of Utah. That affiant expects to prove by each of said witnesses that each of said witnesses separately, and not in conjunction with the others, saw affiant at different times during
31 the alleged day of said alleged murder and up to a late hour during the night thereof, and that when seen by each of said witnesses affiant was in a state of gross intoxication; and affiant expects also to prove by said witnesses that each of said witnesses have known affiant for some time prior to the alleged time of the alleged murder, and that during said time affiant was habituated to the excessive use of alcoholic liquors to the extent of rendering him habitually insane, and was so insane at alleged time of said alleged murder, and to prove by each of said witnesses separate and distinct incidents connected with and bearing out said ultimate facts. That affiant knows of no other person or persons by whom he can prove the facts above stated.

And affiant further states that ever since affiant first knew that he

was accused of the crime set forth in said indictment he has been under arrest and in prison and totally without the means of communicating, or of employing others to communicat*ing*, with any of said witnesses;

32 that immediately on the assignment of counsel to affiant's defense, he communicated to said counsel the names of said witnesses, and the residences of said witnesses when he last saw them, and has been informed by his said counsel and believes that they at once tried to place themselves in communication with said witnesses, and discovered that said witnesses have changed their places of residence & have not been able up to this time to discover the present residence of any of said witnesses. That affiant's counsel have informed him and he believes that they have written to the said witnesses at the addresses as given by affiant and have received no reply, and that they have written to acquaintances of said witnesses and have been informed that the witnesses have left their former places of residence, but did not intend leaving the Territory of Utah, and were, in the opinion of the writer, still somewhere in said Territory, and that neither affiant nor said counsel have yet had time to discover their present residence, or the present residence of either or any of them, although they have used every effort to do so.

33 That none of said witnesses are absent by the permission or consent of this affiant, and affiant expects to procure the testimony of each of said witnesses at the next term of this court, and that this application for a continuance is not made for delay, but that justice may be done.

FREDERICK HOPT.

Subscribed and sworn to before me this 9th day February, 1881.
[NOTARY'S SEAL.] HARRY T. DUKE,
Notary Public.

That said affidavit was filed in said court before the said motion was made; that on said motion being made and after argument thereon by the district attorney and counsel for respondent it was submitted, and the court overruled said motion for a continuance, to which said ruling counsel for the respondent duly excepted.

II. That thereafter on the calling of said cause for trial on the 16th day of February, 1881, the defendant—the court having granted him permission so to do—made another motion for a continuance (the U. S. district attorney being present), which motion and the affidavits on which it was based having been filed in said court before said motion, the following being a copy of the same:

34, 35 TERRITORY OF UTAH,
County of Salt Lake, ss:

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT. } Murder in the first degree.

Now comes said defendant in the above-entitled cause and by his counsel moves said court to continue said cause until the next term of this court on and for the reasons set forth in the affidavits of defendant and of the defendant's counsel hereto attached as a part thereof.

LEE J. SHARP,
JNO. A. MARSHALL,
Counsel for Defendant.

TERRITORY OF UTAH:

In the third judicial district court.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER another name. } Murder in the first degree.

Affidavit for a continuance.

TERRITORY OF UTAH,
County of Salt Lake, ss:

36 Frederick Hopt being first duly sworn, on his oath states that he is the defendant in the above-entitled cause; that he has fully disclosed his defense, so far as he knows the same, to his attorneys, and is advised by them and believes it to be true, and therefore deposes that he cannot safely go to trial in said cause at the present term of this court for the reasons following to wit:

That an indictment was fouhd against said defendant by the grand jury of said court on the 14th day of December, 1880; that said defendant was arraigned on the same day, pleaded not guilty & declined having counsel assigned for his defense for the reason that he was then expecting his father to arrive at Salt Lake City for the purpose of, and with means sufficient to, employ counsel of the defendant's and his father's choosing; that defendant had, previous thereto, written to his father informing him that he was confined in the Utah penitentiary upon the charge of murder, and was totally without means to employ counsel or prepare for his defense; that deponent directed said letter to his father at New Ulm, in the State of Minnesota, his father's place of residence, and caused said letter to be posted, postage pre-

37 paid. That since defendant's arrest he has been constantly confined in the said penitentiary and totally without means to employ counsel or prepare for his defense, but that deponent's said father has ample means for said purposes; that defendant was arrested about the 22nd day of July, 1880; that after some delay defendant received a letter from his mother acknowledging the receipt of said letter to deponent's father and telling deponent that his father was then temporarily in the State of Oregon, and giving his then address; that immediately on deponent's receipt of said letter deponent wrote to his father stating in substance the same matters set forth in said first letter to his father and directed said second letter to his father at the address sent him by his said mother, and caused said second letter to be posted, postage prepaid; that deponent has not yet heard from his said father, and believes that his father never received his said letter, but had changed his address before deponent's said letter reached said State of Oregon, or was at that time on his way back to his home in Minnesota.

Deponent is satisfied that when his father hears of his condition he will hasten to his relief with sufficient means to employ counsel &

38 to prepare for his defense; that on the 24th day of January, 1881, deponent fearing lest his said father might not arrive in time for the present term of this court requested that temporary counsel might be assigned him, and the court thereupon assigned defendant temporary counsel. The deponent on the same day of said assignment had a consultation with the said counsel, and that deponent fully and fairly stated to them his case and all the matters appertaining to the defense

thereof as fully as he could recollect the same; and that defendant has a good and substantial defense, on the merits, to the indictment in this action, as he is advised by his said counsel and verily believes; that for some time prior to and at the time and for some days after the time said alleged murder is alleged in said indictment to have been committed, deponent was in a state of gross intoxication from the use of alcoholic liquors, and that deponent for a long time prior thereto was habituated to the excessive use of alcoholic liquors to the extent of rendering him habitually insane, and was so insane at and for some days sub-
39 sequent to said alleged time of said alleged murder, and defendant further says that he cannot safely proceed to the trial of the above-entitled cause at the present term of this court on account of the absence of Peter May & James Lane, material witnesses on the part of deponent. The present residence of said Peter May is to deponent unknown, for the reason that deponent has been confined in the penitentiary since some time in the month of July, 1880; that at the time of the alleged killing of said Turner, said May was a resident of Park City, Utah, and deponent is informed and believes that said May has left Park City, but is still within the Territory of Utah; that James Lane is at present in the State of Illinois; that deponent deposes on information and belief that since deponent's arrest said Lane has left Park City temporarily, intending to return thereto, and is now temporarily in the said State of Illinois; that said Lane now owns valuable property in said Park City, and defendant believes will certainly return thereto.

That deponent expects to prove by said Peter May that said May saw deponent frequently, for some time prior to the alleged killing of said Turner, and some time during the day thereof, and that when
40 seen by said May said deponent was in a state of gross intoxication, and that for some time prior to the alleged killing of said Turner deponent was habituated to the excessive use of alcoholic liquors to the extent of rendering him habitually insane, and was so insane when seen by said May on the day of said alleged killing.

And deponent expects to prove by said Lane that said Lane saw deponent drinking in said Lane's saloon at about 10 o'clock on the night of the 3rd of July, 1880 (the night on which it is alleged that said Turner was killed), and defendant is informed and believes that said Turner was killed by or before 11 o'clock of said night of the 3rd of July, 1880. That when seen by said Lane, at said time, deponent was in a state of gross intoxication.

That affiant knows of no other person or persons by whom he can prove the facts above stated. And deponent further states that ever since deponent first knew that he was accused of the crime set forth in said indictment he has been under arrest & in prison, & totally without the means of communicating or of employing others to communicate with either of said witnesses, and so had no communication with either of them.

41 That deponent is informed by his counsel, & believes, that as soon as this cause was set for trial said counsel caused subpœnas to be issued for said witnesses, and placed said subpœnas in the hands of the U. S. marshall to be served. That deponent is informed and believes that said subpœnas have not been served, and that neither of said witnesses can be found. That deponent learned for the first time this morning that said Lane was not now in the Territory of Utah. That deponent expected, and had every reason to expect, that said Lane would be found at Park City, Utah, when wanted, said Lane owning

property and doing business at that place. That neither of said witnesses are absent by the permission or consent of this deponent. That deponent expects to produce the testimony of both of said witnesses at the next term of this court. That the deponent is innocent of the crime charged in said indictment, and, if time is offered him until the next term of this court, expects to make good his defense thereto. That this application for a continuance is not made for delay, but that justice may be done.

FREDERICK HOPT.

Subscribed and sworn to before me this 16th day of February, A. D. 1881.

O. J. AVERELL, *Clerk*,
By H. G. McMILLAN,
Deputy Clerk.

42 In the third judicial district court of the Territory of Utah.

THE PEOPLE OF THE TERRITORY OF UTAH
vs.
FREDERICK HOPT, INDICTED UNDER THE NAME of Frederick Welcome.

TERRITORY OF UTAH,
County of Salt Lake, ss:

These affiants, John A. Marshall and Lee J. Sharp, make oath and state that they were assigned to the defense of the above-named defendant on the 24th day of January, A. D. 1881, and alone have the management of said defense; that since their said assignment as counsel for defendant they have used all reasonable diligence to place themselves in communication with defendant's witnesses, & to prepare for a defense in said case, and that thus far they have been unable to communicate with defendant's witnesses, or to ascertain the facts in said case, or to prepare for his defense; that said affiants, and each of them, state that they are not personally acquainted with any of the witnesses for defendant, except two, that answered to their names in the court-room this morning, and that affiants had never met said
43 two witnesses until this morning, after they answered to their names, and then they only had a minute's conversation with them.

That said affiants are satisfied that they are unable at this term of court to do justice to defendant's cause, or to see that he has a fair and impartial trial. That immediately after the sitting of this cause for trial affiants, as counsel for defendant, obtained subpœnas for the witnesses named in defendant's affidavit hereto attached, and placed same in hands of the marshall of Utah Territory for service; and that affiants are informed and believe that the witnesses named in defendant's said affidavit have not been served with said subpœna and are not in attendance on this court. These affiants are ignorant of the facts of this case and grounds of the defense, except as stated to them by the defendant, and the defendant has stated to them matters which in their opinion constitute a good defense to the crime charged in this indictment.

JNO. A. MARSHALL.
LEE J. SHARP.

Subscribed and sworn to before me this 16th day of February, A. D. 1881.

O. J. AVERELL, *Clerk*,
By CHAS. S. BLANDIN,
Deputy Clerk.

44 Said notice having been fully argued, submitted to the court; the court overruled the same; to which ruling of the court the defendant then and there duly excepted.

45 III. Said cause coming regularly for trial at the February term of said court, on the 16th day thereof, according to the order of said court, the respondent being personally present and being represented also by counsel, & the district attorney, representing the people, being also present, the court ordered a jury to be called, which was done, and said jurors having been sworn to answer truly such questions as might be put to them, touching their competency to sit as trial jurors in said cause, & before they were sworn as trial jurors, counsel for the respondent proceeded to examine said jurors, and examined one Juror. of said jurors whose name was William Schade, & who on said examination answered as follows to the following questions:

Q. From what you have read or heard have you formed or expressed any opinion as to the guilt or innocence of the accused (the respondent in this case)?

A. Yes, sir.

Q. Is that opinion qualified or unqualified?

A. It is qualified, I suppose.

Q. Would it take sworn evidence to remove that opinion, or would you render a verdict according to the testimony?

46 A. I would render a verdict according to the testimony.

Q. Have you still the same opinion?

A. Yes, sir.

Q. Would it take sworn evidence to remove that opinion?

A. Yes, sir; it would.

The above are the all answers of said juror as to any opinion he had formed or then had as to the guilt or innocence of the respondent, and the respondent thereupon challenged said juror for implied bias, for the cause that he had formed an unqualified opinion or belief that the prisoner was guilty or not guilty of the offense charged (under subdivision 8 of § 242). The district attorney, on behalf of the people, denying the facts stated as the grounds of said challenge, the said challenge was submitted to the court, and the court overruled said challenge; to which ruling of the court the respondent then and there duly excepted.

And the said respondent thereafter exhausted all of the peremptory challenges allowed him by law before said jurors were sworn as the trial jury.

47 V. That one of the jurors called was William McQueen, who was passed for cause both by the respondent and by the prosecution; that after said juror had been so examined and passed the prosecution waived and refused to exercise several of their peremptory challenges, and after said waiving and refusal to exercise the prosecution challenged said McQueen peremptorily. The respondent objected to the prosecution peremptorily challenging said McQueen, for the reason that since the calling and examination of said McQueen, and since said prosecution had passed him for cause, said prosecution had waived and refused to exercise several of their peremptory challenges, which

was an acceptance of the jury as it stood at the time of said waiver. Said objection being submitted to the court said court overruled said objection; to which ruling of the court the respondent then and there duly excepted; and said McQueen was thereupon excused.

VI. After the jury had been sworn and during the progress of said trial the prosecution called as a witness T. J. Carr, and interro-
48 gated said Carr as to a confession made to him and to a policeman of Cheyenne by respondent a few minutes after the arrest of said respondent by said Carr and said policeman on the charge charged in the indictment in this cause. Said Carr testified as follows:

Testimony of Mr. T. J. Carr.

Mr. VAN TYLE. You may state now anything that he said to you with reference to this transaction.

(Objected to.)

Q. I will ask you first, Mr. Carr, prior to any statement he may have made to you concerning this case, whether any influence had been brought to bear upon him by way of either promises or reward or threats to induce him to make a statement to you?

A. No, sir; there was nothing. There was no inducement held out to him to say anything—anything against his——

Q. No threats made?

A. No, sir. All that I heard him say was of course said vol-
49 untarily by him. There was no person interested enough that I know of there to force him to say anything by threats.

Mr. SHARP. I want to know if you heard what passed between him and the policeman before he made the statement?

A. No, sir; I was not present all the time.

By the COURT. Was it voluntary, that conversation?

A. Yes, sir; they were voluntary statements made after his arrest. In fact part of it was made before he got to the jail, and the balance of it after he got in the jail.

Mr. SHARP. I understand that you do not know what passed between him and the policeman before he made that statement.

A. No, sir; could not tell anything that passed between him and the policeman; that I did not hear.

Q. I will ask you if the second statement was a voluntary statement or not?

A. It was a voluntary statement, undoubtedly. His whole
50 talks in my presence was voluntary from first to last.

Q. You had no interest in pressing him?

A. No, sir; only mere curiosity. He was as forward to tell of the matter as we were to enquire. He was as ready to tell about as we were to enquire. We, of course, had some curiosity, the same as everybody else.

Cross-examination:

By Mr. SHARP. Did you hear all that passed between him and the policeman from the time that you arrested him and the jail?

A. No, sir; I could not. I was not in hearing all the time. I followed behind some little distance at first. When they first started off I was behind a few steps, but I overtook them on the way up.

Q. How far did the prisoner and the policeman—how far did they go in advance of you; how many blocks did they go while you were walking behind?

A. They went from two to three blocks.

Q. How far were you behind?

51 A. Well, I do not know first; it was—I kept gaining a little on them.

Q. How far?

A. I don't know; it might have been 100 feet or it might have been 150.

Q. You do not know what passed between them prior to his first conversation?

A. They had some little talk, I suppose; but I don't know what it was.

The policeman mentioned in Carr's testimony was not called as a witness.

Carr attempting to repeat said confession, in reply to a request so to do on part of the prosecution, counsel for respondent objected, on respondent's behalf, to the witness being allowed to repeat said confession, on the grounds that it must affirmatively appear before any evidence of a confession is admitted that said confession was made freely and voluntarily, and not influenced by fear of threats, nor by the hope of reward, and that these requisites had not appeared from the evidence of said Carr; and no other witness having testified as to any matter touching said confession made to Carr, said objection be-

52 ing submitted to the court, the court overruled the same; to which ruling of the court the respondent then and there duly excepted, and said witness therefore detailed a confession implicating said respondent in the crime charged in said indictment.

VII. That in charging the jury the court gave of its own motion a charge to the jury without reducing said charge to writing, or having it reduced to writing before giving the same, nor was it reduced to writing after it was given, nor has it ever been filed with the other charges in said cause; but said court read said charge from a printed book, and in his written charges to said jury referred in writing to said charge in the following manner only: "Follow this from magazine American Law Register, July, 1868, page 559," said defendant not consenting to said charge being so given or being given without its being previously thereto reduced to writing.

53 ASSIGNMENT OF ERRORS OF LAW.

I. The court erred in overruling the motion made by defendant, on the 9th day of February, 1881, for a continuance of said cause for the February term.

II. The court erred in overruling the motion made by defendant on the 16th day of February, 1881, for a continuance of said cause for the February term.

III. The court erred in overruling defendant's challenge to the juror William Schade for implied bias for having formed an unqualified opinion as to the guilt or innocence of the accused.

IV. The court erred in allowing the prosecution to peremptorily challenge the juror William McQueen, when they had waived several of their peremptory challenges, after passing said McQuen for cause, therefore peremptorily challenging him, and in sustaining said challenge under said circumstances.

V. The court erred in admitting the evidence of T. J. Carr as to

the confession of defendant after his arrest, it not having been shown that said confession was made freely and voluntarily, and was
54 not induced by the fear of threats nor by the hope of reward.

VI. The court erred in refusing to give defendant's request No. 4.

VII. The court erred in refusing to give defendants request No. 5.

VIII. In the first instruction given by court of its own motion, the court erred in instructing the jury that it was just as wrong to find a guilty man innocent as to find an innocent man guilty.

IX. The court erred in giving its instruction headed "intoxication" (not numbered).

X. The court erred in giving an instruction to the jury without reducing the same to writing before it was given; said instruction being referred to by court as taken from American Law Register, p. 559.

XI. The court erred in giving the instruction referred to by said court as taken from American Law Register, p. 559.

55 The following, among other facts, are admitted, as shown by the testimony:

That John F. Turner, the deceased, was killed at his camp near Park City (a short distance away and not over 10 to 15 minutes' walk from Creek and Dodge's saloon), on the evening of July 3rd, 1880, certainly between about dusk and the hour of 10½ p. m., the time when defendant and Emerson were first seen in Creek and Dodge's saloon. Sheriff Allison testified at about 8 to 9 p. m. of said day he saw defendant in Lane's saloon, & he was not drunk. Saw him again same evening about 10 to 11 with Emerson in Creek and Dodge's saloon. Defendant was then drinking hard; was pretty full; showed it. Saw him on 4th and 5th of July, & noticed nothing peculiar about him, except that he was drinking. Chas. Jones saw defendant Emerson and deceased about dusk of July 3rd at the said camp of deceased. Next saw defendant and Emerson about 10.30 p. m. the same evening going up the street of Park City, in front of Simon's hotel, and going towards Creek and Dodge's saloon, and passed within three feet of witness.

56 Several other witnesses saw defendant on July 3rd during the day and evening, and none speak of him drinking enough to be noticeable until after 10 p. m. Nor do any of the witnesses, some of whom knew him well and had seen him for some time prior, give any testimony tending to show defendant at any time insane in any sense, except that after 10 p. m. of July 3rd he was more or less intoxicated, & there is no evidence that immediately prior to that hour he was so during said day, unless the circumstances of said killing could be considered as evidence of insanity.

(This added by order of the court and without consent of defendant.)

57 After the instructions of the court the jury retired for deliberation, and then returning to court, brought in a verdict against said defendant of guilty of murder in the first degree.

The court, on motion of counsel for respondent, then ordered that said respondent should have until the 12th day of March, 1881, to prepare, file, and present to the court for signing and settling bills of his exceptions to the orders of the court overruling defendant's two applications for continuance, & to any order, ruling, charge, or action of said court during the trial of said cause, and in which to make a motion for

a new trial, and that sentence on said verdict should be in the mean time stayed.

On the second day of March the said court extended the time mentioned in said first order until the 20th day of March, 1881, in which to do the matters therein specified, and stayed sentence in the mean time, and on the 19th day of March, 1881, said court having again extended said time for said purpose up to the date of signing hereof, and inasmuch as the matters aforesaid do not appear of record, the said
58 counsel for defendant present these bills of exceptions, and pray that the same may be signed and settled and made a part of the record in said cause; and it is done accordingly.

PHILIP H. EMERSON, *Judge.*

MARCH 28TH, 1881.

59 (Indorsed:) The People of the Territory of Utah vs. Frederick Hopt. In third district court. Defendant's bill of exceptions. Statement on motion for new trial. Filed M'ch 28, 1881. O. J. Averell, clerk, by H. G. McMillan, deputy clerk. Lee J. Shark & Jno. A. Marshall, counsel for defendant.

60, 61 Title of court and cause.

Now comes the above-named defendant and moves the court to grant him a new trial in this cause for the reasons and upon the grounds set forth in the bill of exceptions and the assignment of error filed herein by defendant.

JNO. A. MARSHALL &
LEE J. SHARP,
Att'ys for Def't.

(Endorsed:) Motion for a new trial. Filed March 28, 1881. O. J. Averell, clerk, by H. G. McMillan, deputy clerk.

62 [Title of court and cause.—Murder in the first degree.]

The motion for a new trial comes on now to be heard upon the settled statement filed herein, and the record in the case and the premises having been fully considered, it is now ordered and adjudged by the court that the motion of defendant Frederick Hopt for a new trial herein be, and the same is hereby, overruled; and the court gives as reasons for overruling the motion that no errors occurred in the trial of said cause as alleged, and the verdict is supported by law.

To which ruling and order said defendant duly excepted and gives notice of appeal herein, and the court fixes April 4th, 1881, at 2 o'clock p. m. for passing its sentence herein.

March 28th, 1881.

PHILIP H. EMERSON, *Judge.*

63 THE PEOPLE OF THE TERRITORY OF Utah
vs.
FREDERICK HOPT, INDICTED WITH ANOTHER in name of Fred. Welcome.
} Murder in the first degree.

Defendant Frederick Hopt, indicted herein in the name of Fred. Welcome with another, having been heretofore found guilty of the crime of

murder in the first degree by a jury duly empanelled thereto on the 19th day of February, 1881, and being now brought before the court for sentence, and being asked by the court if he has anything to say why sentence should not be passed upon him, replies that he is innocent of the crime charged against him, and said defendant choosing to be shot rather than to be hung, it is the judgment of the court that you be taken from hence to some place of confinement in this district, that you be there safely kept until Friday, the 20th day of May next; that between the hours of ten o'clock in the forenoon and three o'clock
64 in the afternoon of the last-named day, in the yard of the jail or place where you are confined, or in some other private place in the district, you be shot until you are dead.

April 4th, 1881.

PHILIP H. EMERSON, *Judge.*

Title of court and cause.

Notice of appeal.

To the clerk of said district court and to P. L. Van Zile, U. S. district att'y.

Please take notice that the defendant in the above-entitled cause hereby appeals to the supreme court of this Territory from an order made and entered in said cause in said district court of the 28th day of March, 1881, overruling defendant's motion for a new trial, and also from the judgment therein made and entered in said court on the 4th day of April, A. D. 1881, against said defendant in said cause, and from the whole of said judgment.

April 25th, 1881.

LEE J. SHARP AND
JOHN A. MARSHALL,
Att'ys for Def't.

(Endorsed:) Title of court and cause. Notice of appeal. Filed April 25th, 1881. O. J. Averell, clerk, by H. G. McMillan, deputy clerk.

Served by copy after being filed April 25th, 1881.

JAS. H. BEATTY,
Asst. U. S. Att'y for Utah.

65 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, O. J. Averell, clerk of third judicial district court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original indictment, with endorsements, arraignment, and plea, order appointing counsel, instructions to jury given and refused, verdict, bill of exceptions on motion for a new trial, motion for new trial, order entered and filed, with reasons for overruling motion for a new trial, sentence and judgment of the court, and notice of appeal in the above-entitled action, filed in my office.

Witness my hand and the seal of said court, at Salt Lake City, this 29th day of April, A. D. 1881.

[SEAL.]

O. J. AVERELL, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

66 (Indorsed:) People, &c., vs. Fred K. Hopt, murder. Filed April 29th, 1881. E. S. Sprague, clerk supreme c't.

67 Afterwards, at a term of said supreme court of Utah Territory, begun and held at Salt Lake City on the 6th day of June, A. D. 1881, the following proceedings were had in said court and cause, and entered on the records of said court, as follows, to wit:

SATURDAY, *June* 11, 1881.

THE PEOPLE, &C., RESPONDENTS,
vs.
FRED. HOPT, IMP., &C., APPELLANT. } From 3d dist.

This cause coming on regularly for hearing, was argued by J. A. Marshall, for appellant.

MONDAY, *June 13th, A. D.* 1881.

THE PEOPLE, &C., RESPONDENTS,
vs.
FRED. HOPT, IMP. &C., APPELLANT. } From 3d dist.

This cause was further argued by P. T. Van Zile, esq., for respondents, and L. J. Sharp, esq., in reply, submitted, and taken under advisement.

68 SATURDAY, *July 23d, A. D.* 1881.

THE PEOPLE OF THE TERRITORY OF UTAH,
respondents,
vs.
FREDERICK HOPT, ALIAS FRED. WELCOME,
imp., appellant. } From 3d dist.

This cause having been heretofore, at the present term of this court, argued, submitted, and by the court taken under advisement, now, on this 23d day of July, A. D. 1881, this court being fully advised in the premises, it is ordered, considered, adjudged, and decreed by the court now here, that all and singular the judgment, order denying new trial, and sentence of the district court of the third judicial district, save as to the time of execution thereof, be, and the same are hereby, affirmed; and it is further ordered that said cause be remanded to said district court, and that said district court do proceed to set and fix a day for carrying into execution the sentence and judgement so affirmed. Remittitur is stayed for twenty days from this day.

Judge Twiss dissents.

68½ Afterwards, on the 10th day of August, 1881, were issued a writ of error and citation in said cause, and a copy of said writ was lodged in the office of the clerk of said supreme court of Utah Territory, the original thereof and of said citation, with proof of service of the latter thereon, follows, to wit:

69 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of the judgement, order, and decree, in a suit which is in the said supreme court of the Territory of Utah, before you, in which The People of the Territory of Utah were plaintiffs and respondents, and Frederick Hopt, alias Frederick Welcome, impleaded with another, was defendant and appellant, manifest error hath happened to the great damage of the said Frederick Hopt:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgement be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the
70 same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, and the seal of the supreme court of the Territory of Utah, the tenth day of August, in the year of our Lord one thousand eight hundred and eighty-one.

[SEAL.] E. T. SPRAGUE,
Clerk of the Supreme Court of Utah Territory.

(Indorsed:) The People, &c., vs. Fred. Hopt, alias, imp. Writ of error. Filed August 10, 1881. E. T. Sprague, clerk sup. c't.

71 The United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein Frederick Hopt is plaintiff in error, and you, The People of the Territory of Utah, defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 10th day of August, in the year of our Lord one thousand eight hundred and eighty-one.

JOHN A. HUNTER,
Chief Justice of the Supreme Court of the Territory of Utah.

TERRITORY OF UTAH,
Salt Lake County, ss:

On this the 10th day of August, in the year of our Lord one thousand eight hundred and eighty-one, personally appeared Lee J. Sharp,
72 before me, the subscriber, clerk of the supreme court of the Territory of Utah, and makes oath that he served and delivered a

true copy of the above and within citation to P. T. Vanzile, United States district attorney for the Territory of Utah, and to James H. Beatie, assistant United States district attorney for said Territory of Utah, who are now representing the defendant in error in this case as attorneys, by leaving a true copy of said citation at their office in Salt Lake City, Utah Territory, on this the 10th day of August, A. D. 1881, between the hours of 9 o'clock a. m. and 3 o'clock p. m. of that day, with S. M. Finley, then and now in charge of the office of said district attorney, and his assistant; the said district attorney and his assistant, as affiant, was informed & believes, being absent from the city and county of Salt Lake, Utah Territory.

LEE J. SHARP.

Subscribed & sworn to before me this 10th day of August, 1881.
[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

A true copy of the above citation was received by me the 10 day of August, A. D. 1881, by leaving same at my office.

JAS. H. BEAT E,
Ass't U. S. Dist. Att'y for Utah.

(Indorsed:) Fred. Hopt, pl'ff in error, vs. The People, &c., def'ts in error. Citation. Filed 10th Aug., 1881. E. T. Sprague, clerk sup. c't.

72½ And on said 10th day of August, 1881, was filed in said office of the clerk of the supreme court of Utah Territory an assignment of errors, of which the following is a copy:

73 UNITED STATES OF AMERICA:

In the Supreme Court of the United States in error to the supreme court of the Territory of Utah.

FREDERICK HOPT, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH,
defendants in error.

Now comes the said Frederick Hopt, by J. R. McBride and Lee J. Sharp, his attorneys, and says there is manifest error in the record & proceedings and judgment of the supreme court of the Territory of Utah, and assign the following as error, to wit:

The supreme court erred in affirming the judgment of the district court, wherein and whereby it was adjudged that the said plaintiff in error should be shot to death; also in affirming the judgment & order of the district court overruling the motion of the plaintiff in error for a new trial for the following reasons as assignments of error, to wit:

74 First. The districts court erred in overruling the motion made by defendant on the 9th day of February, 1881, for a continuance of said cause for the February term.

Second. The said court erred in overruling the motion made by defendant on the 16th day of February, 1881, for a continuance of said cause for the said February term.

Third. The said court erred in overruling defendant's challenge to the juror William Schade for implied bias for having formed an unqualified opinion as to the guilt or innocence of the accused.

Fourth. The said court erred in allowing the prosecution to peremptorily challenge the juror William McQueen, when they had waived several of their peremptory challenges after passing said McQueen for cause & before peremptorily challenging him, and in sustaining said challenge under said circumstances.

75 Fifth. The said court erred in admitting the evidence of T. J. Carr as to the confession of defendant after his arrest, it not having been shown that said confession was made freely & voluntarily, and was not induced by the fear of threats nor by the hope of reward.

Sixth. The said court erred in refusing to give defendant's request No. 4.

Seventh. The said court erred in refusing to give defendant's request No. 5.

Eighth. In the first instruction given by the district court of its own motion the court erred in instructing the jury that it was just as wrong to find a guilty man innocent as to find an innocent man guilty.

Ninth. The said court erred in giving its instruction headed intoxication (not numbered).

Tenth. The said court erred in giving an instruction to the jury without reducing the same to writing before it was given, said instruction being referred to by the court as taken from American Law Register, p. 559.

76 Eleventh. The said court erred in giving the instruction referred to by said court as taken from American Law Register, p. 559.

The plaintiff in error therefore prays that said judgement & decision of the supreme court of the Territory of Utah affirming said judgement and said order may be reversed, and that a mandate may issue from this honorable court directing the said supreme court of said Territory to reverse the judgement and order of the district court, and remand the case to the said district court with an order to said district court to grant said plaintiff in error a new trial.

J. R. McBRIDE AND
LEE J. SHARP,
Att'ys for Pl'ff in Error.

Filed 10th Aug., 1881. E. T. Sprague, clerk sup. court.

And on Aug. 23d, 1881, were filed certificate & affidavit of which a copy follows:

77 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 24th day of January, A. D. 1871.

Present, the Hon. John A. Hunter, judge of the third judicial district.

THE PEOPLE OF THE TERRITORY OF UTAH, plaintiff, *vs.* FREDERICK HOPT AND JOHN McCONNELL, defendants.	Murder in the first decree.

The said defendants are now brought before the court, and each now

72

requests the court to appoint counsel for him, and the court appoints J. A. Marshall and L. J. Sharp, counsel for said defendant Frederick Hopt, and E. D. Hoge and Henry F. Williams, counsel for def't John McConnell.

JOHN A. HUNTER, *Judge.*

I, O. J. Averill, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof I have hereunto set my hand and the seal of said court this tenth day of August, A. D. 1881.

[SEAL.] O. J. AVERILL, *Clerk,*
By H. G. McMILLAN,
Deputy Clerk.

(Indorsed:) No. . District court, third judicial district, county of Salt Lake. People, &c., plaintiff, against Fred'k Hopt et al., defendant. Certified copy of order. Filed Aug. 23d, 1881. E. T. Sprague, clerk. L. J. Sharp and J. A. Marshall, attorney for .

78 UNITED STATES OF AMERICA:

In the Supreme Court of the United States, in error to the supreme court of the Territory of Utah.

FREDERICK HOPT, PLAINTIFF IN ERROR,
vs.
THE PEOPLE OF THE TERRITORY OF UTAH,
defendants in error.

TERRITORY OF UTAH,
County of Salt Lake, ss:

These affiants, John A. Marshall and Lee J. Sharp, make oath and state, each for himself and not one for the other, that he was assigned by the district court in and for the third judicial district Utah Territory to the defense of Frederick Hopt, the above-named plaintiff in error; that he has not received any compensation or reward as attorney in said cause, and has not the promise or hope of reward for any sevices rendered or that he may render in said cause; that, as affiant is informed and believes, said plaintiff in error is a pauper and
79 unable to employ counsel or to pay the costs of the trial.

JOHN A. MARSHALL.
LEE J. SHARP.

Subscribed & sworn to before me this 23d day of August, A. D. 1881.

[L. S.] E. T. SPRAGUE,
Clerk of Supreme Court, Utah Territory.

Filed Aug. 23d, 1881. E. T. Sprague, clerk.

80 TERRITORY OF UTAH,
County of Salt Lake, ss:

I, E. T. Sprague, clerk of the supreme court of said Territory, in obedience to the annexed writ of error, do herewith return said writ.

the citation issued thereon, a transcript of the record and proceedings in and of said court in the cause in said writ mentioned, and of the assignment of errors, certificate of clerk of 3d district court, and affidavit of counsel therein to the Supreme Court of the United States. And I hereby certify that said annexed and foregoing transcript of said record and proceedings, assignment of errors, certificate, and affidavit is a full, true, and correct copy of the several originals thereof on file or of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court of Utah Territory at Salt Lake City this 7th day of September, A. D. 1881.

[SEAL.]

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

(Indorsement on cover:) No. 1112. Frederick Hopt, plaintiff in error, vs. The People of the Territory of Utah. Utah Terr'y sup. court. Filed 21st October, 1881.

FILED
DEC 22
McKinney

BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

NO. 1112.

FREDERICK HOPT. PLAINTIFF IN ERROR,

VS.

THE PEOPLE OF THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH

SUPREME COURT OF THE UNITED STATES.

NO. 1112.

FREDERICK HOPT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE TERRITORY OF UTAH.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH

BRIEF OF PLAINTIFF IN ERROR:

We shall, *briefly*, call the attention of the Court to the errors complained of, and the authorities in support of our position, deeming it unnecessary to argue our propositions at length.

STATEMENT OF FACTS.

The appellant was indicted for murder in the first degree by the Grand Jury of the Third Judicial District, on the 14th day of December, 1880, was arraigned on the 17th day of December, 1880, and pleaded not guilty. Counsel were assigned appellant on the 24th day of January, 1881. On the 9th day of February, 1881, appellant, by his counsel, made a motion for a continuance, which was overruled by the Court. The case was then set down by the Court for trial on the 16th of the same month. On the case being called for trial on the 16th of February, appellant, by his counsel, made another motion for a continuance, which was likewise overruled by the Court; trial was had and verdict of guilty rendered against appellant. On the 28th day of March, 1881, time having been extended to that date by the Court, appellant made a motion for a new trial, which was overruled by the Court and on the 4th day of April, 1881, the Court rendered judgment against said appellant and sentenced him to be shot. This appeal is from the order overruling the motion for a new trial and from the judgment.

ASSIGNMENT OF ERRORS.

Now comes the said Frederick Hopt, by J. R. McBride and Lee J

Sharp, his attorneys, and says there is manifest error in the record and proceedings and judgment of the supreme court of the Territory of Utah and assign the following error, to wit:

The supreme court erred in affirming the judgment of the district court, wherein and whereby it was adjudged that the said plaintiff in error should be shot to death; also in affirming the judgment and order of the district court overruling the motion of the plaintiff in error for a new trial for the following reasons as assignments of error, to wit:

First. The district court erred in overruling the motion made by defendant on the 9th day of February, 1881, for a continuance of said cause for the February term.

Second. The said court erred in overruling the motion made by defendant on the 16th day of February, 1881, for a continuance of said cause for the said February term.

Third. The said court erred in overruling defendant's challenge to the juror William Schade for implied bias for having formed an unqualified opinion as to the guilt or innocence of the accused.

Fourth. The said court erred in allowing the prosecution to peremptorily challenge the juror William McQueen, when they had waived several of their peremptory challenges after passing said McQueen for cause and before peremptorily challenging him, and in sustaining said challenge under said circumstances.

Fifth. The court erred in admitting the evidence of T. J. Carr as to the confession of defendant after his arrest, it not having been shown that said confession was made freely and voluntarily, and not induced by the fear of threats nor by the hope of reward.

Sixth. The said court erred in refusing to give defendant's request No. 4.

Seventh. The said court erred in refusing to give defendant's request No. 5.

Eighth. In the first instruction given by the district court of its own motion the court erred in instructing the jury that it was just as wrong to find a guilty man innocent as to find an innocent man guilty.

Ninth. The said court erred in giving its instruction headed intoxication (not numbered).

Tenth. The said court erred in giving an instruction to the jury without reducing the same to writing before it was given, said instruction being referred to by the court as taken from American Law Register.

p.559.

Eleventh. The said court erred in giving the instruction referred to by said court as taken from American Law Register, .559.

The plaintiff in error therefore prays that said judgment and decision of the supreme court of the Territory of Utah affirming said judgment and said order may be reversed, and that a mandate may issue from this honorable court directing the said supreme court of said Territory to reverse the judgment and order of the district court, and remand

the case to the said district court with an order to said district court to grant said plaintiff in error a new trial.

J. R. McBRIDE AND
LEE J. SHARP,
Att'ys for Pl'ff in Error.

Filed 10th Aug., 1881. E. T. Sprague, clerk sup. court.

FIRST.

The District Court erred in overruling appellant's first motion for a continuance.

The general rule is that a continuance will be granted on an affidavit setting forth the absence of a material witness for the defense, and alleging that his attendance will be procured at next term of court, and that due diligence has been used in attempting to procure his attendance.

3 Wharton, Crim. Law, Sec. 30 21.

The affidavit on which this motion was founded contained these requisites; that the evidence sought to be adduced was material:

1 Wharton, p. 46 48.

5 Mason (U. S.) 28.

2 Cranch 158, 1 Wharton, p. 88.

Peo. *vs* March 6 Cal. 543.

In judging of the diligence used the fact that appellant was kept in close confinement, from the time he first had notice of the accusation, must be considered.

2 Graham & Waterman, New Trials 702.

When there is sufficient showing of materiality and no apparent lack of diligence continuance should be granted.

People *vs* McCrory, 41 Cal 458.

But we submit that appellant used all the means in his power to obtain the personal attendance of his witnesses.

People *vs* Dodge, 28 Cal. 445.

Choate *vs* Bullion Co., 1 Nev. 74.

Not to grant a continuance on an affidavit substantially complying with the statute is error, for which a case will be reversed.

Choate *vs* Bullion Co., 1 Nev. 74.

Gillespie *vs* State, 12 Mo 497.

2 Graham & Waterman, New Trials, 698.

SECOND.

The Court erred in overruling the second motion for a continuance

The second motion for a continuance was based upon appellant's own affidavit and upon an affidavit of appellant's counsel. Appellant's second affidavit only varied from the first in adding the name of an additional witness, and stating that said witness would prove that at the time of the killing set forth in the indictment, appellant was in a state of gross intoxication. and in stating that said witness had temporarily departed from the Territory of Utah, but would return before the next term of court.

There are two additional questions presented on this affidavit not involved in the first:

1st. Was evidence of intoxication material?

That it was material is shown by authorities cited in appellant's brief in discussing the seventh assignment of error.

2nd. Will a continuance be granted if an absent witness is beyond the jurisdiction of the court?

It has been the universal practice to grant it if the affidavit sets forth sufficient facts to justify the belief of affiant that he will be able to produce the absent witness by the next term of court.

People *vs* Brown 46 Cal. 102.

Choate *vs* Bullion Co., 1 Nev. 73.

People *vs* Vermilyea, 7 Cow. 384.

Com. *vs* Hilliard, 1 Mass. 96.

Eubanks *vs* People, 41 Ill. 486.

Moore's Crim. Law, p. 628 and cases there cited.

The affidavit of appellant's counsel presented another reason for granting the second motion for a continuance not presented on first motion. namely, that they had not had sufficient time to properly prepare the defendant's case, and could not, in their opinion, do him justice at that term of court.

People *vs.* Logan, 4 Cal. 188.

We submit that there was a gross abuse of discretion in overruling each of said motions for continuance, there being nothing to show a want of good faith on the part of the applicant. (Trans. 9 to 14 inclusive.)

THIRD.

The challenge to the juror, William Schade, should have been sustained.

The point to be determined as to the qualification of a juror in a criminal case is, whether at the time of his examination, he has an un-

qualified opinion as to the guilt or innocence of the accused, and not what might be the state of his mind after hearing the evidence.

Sec. 242, Sub. 8 Crim. Prac. Act

People *vs* Cottle, 6 Cal. 227.

Ap. People *vs.* Edwards, 41 Cal. 640.

People *vs* Gehr, 8 Cal. 359.

People *vs* Johnston 46 Cal. 78.

To leave it with the juror to say whether his opinion is an "unqualified" one or not would be making him the judge of his own qualifications, which evidently was not the intention of our statute.

People *vs.* Weil, 40 Cal. 269.

The meaning of "unqualified opinion" as used in our statute, is a "fixed opinion," one that would require evidence to remove.

People *vs* Gehr, 8 Cal. 359.

People *vs.* Johnston, 46 Cal. 78.

The juror, Schade, stated that it would require evidence to remove the opinion he had formed and then entertained. (Trans. p. 15.)

When, after proper investigation, doubts more or less grave, as to the actual state of mind of juror still remain, the challenge for implied bias should be allowed.

People *vs.* Brotherton, 43 Cal. 78.

The record in this action shows that the defendant exhausted all of the peremptory challenges allowed him by law; that being the case an appellate court will presume that injury resulted to the defendant from the erroneous action of the trial court in denying a challenge for cause.

People *vs* Weil, 40 Col. 269.

We submit that in a *murder* case defendant is not required to exhaust a portion of his evidence to bring the mind of the juror to the point it should be when he enters the jury box.

FIFTH.

The evidence of Carr as to the confession of the appellant should not have been admitted. A confession is a "voluntary admission," one uninfluenced by the hope of reward or the fear of punishment.

1 Bouvier Law, Dict. *title confession.*

To entitle appellant's alleged confession to be admitted in evidence it should have been affirmatively shown that it was voluntary.

1 Greenleaf on Ev., Sec. 219, Red. Ed.

Regina *vs.* Warringham, 2 Leading Crim. Cases 487.

This was not done in the case at bar, on the contrary it appears from the testimony of Carr, (Trans. p. 16,) that defendant and the policeman who aided in the arrest, had some minutes conversation without the hearing of the witness, and immediately before the confession testified to was made. The policeman who aided in the arrest was not called as a witness. (Trans. p. 17.

We therefore argue that the evidence should not have been admitted.

SIXTH.

The Court erred in refusing to give defendant's request No. 5.

This request was upon the subject of intoxication. (Trans. p. 5.)

Our statute has made the fact of intoxication material, both expressly by Sections 18 20.

Penal Code Rev. Stat., p, 568, and impliedly by dividing murder into two degrees, and making the test between them the question "was the murder committed wilfully, deliberately and premeditately?"

This being the test question, the state of mind of the accused as being either favorable or unfavorable to deliberation and premeditation would be a necessary subject of inquiry. The instruction asked by appellant is in exact accordance with the law on this subject.

1 Wharton Crim. Law, Sec. 41.

1 Bishop Crim. Law, Sec's. 490-1-2.

People *vs.* Belancia, 21 Cal. 544.

People *vs.* Nichol, 34 Cal. 215.

People *vs.* Harris, 29 Cal. 682.

Pigman *vs.* State, 14 Ohio 555.

People *vs.* Robinson, 2 Park Cr R. 304.

Rogers *vs.* People, 3 Park Cr R. 645.

Com. *vs.* Jones, 1 Leigh 612.

Roswell *vs.* Com., 20 Grat. 860.

Sivan *vs.* State, 4 Humph. 131.

Pirtle *vs.* State, 9 Humph. 434.

Hale *vs.* State, 11 Humph. 154.

Penns. *vs.* McFall, Addison 257.

Kelly *vs.* Com.. 1 Grant 484,

(See Trans. p. 18,) as to facts admitted in regard to time homicide

was committed, and the condition of defendant as being drunk or sober.

SEVENTH.

The instruction complained of in the eighth assignment of error was contrary to the first principles of criminal law. It placed "finding a guilty man innocent" and "finding an innocent man guilty" on exactly the same footing, and justified the jury in believing that they were to find their verdict according to the preponderance of evidence. (Trans. p. 2.)

3 Greenleaf on Ev, Sec. 29 (Red. Ed.)

That the judge afterwards instructed the jury correctly as to the evidence necessary to convict did not cure this error, as the giving of contradictory instructions is always ground for reversing a case.

People *vs.* Valencia, 43 Cal. 552.

Brown *vs.* McAllister, 39 Cal. 573.

Bank *vs.* Stockton, 53 Cal. 708.

Chidester *vs.* Con. P. Ditch Co., 53 Cal. 56.

EIGHTH.

The court, of its own motion, gave an instruction to the jury on the subject of intoxication. We submit that this instruction did not fully present the law to the jury. as was the duty of the court to do. (Trans p. 4.

3 Wharton Crim. Law p. 153 and cases there cited.

The defendant had requested an instruction on this point, directing the jury that the intoxication of the accused was a proper subject of inquiry in determining the degree of the murder. (Defendant's request No. 5.) This the court refused to give, and gave an instruction of its own accord, withdrawing altogether from the consideration of the jury the subject of the intoxication of the accused.

That this was error see authorities quoted in appellant's brief under seventh assignment of error The very authority quoted by the court 12 Nev., p. 149, supports the contrary position.

NINTH.

The error complained of under the tenth assignment is that the court read an instruction to the jury from a book, simply referring to said book in writing by its title and page, and not indicating where the instruction commenced or ended. (Trans p. 8.) This was contrary to both letter and intent of the statute.

Sec. 257, Sub. 7 Code Crim. Proc., Utah.

A similar section in Cal. Penal Code has repeatedly been declared mandatory.

People *vs.* Beder, 6 Cal. 246.

People *vs.* Pagar, 8 Cal. 423.

People *vs.* Shau, 26 Cal. 78.

People *vs.* Trim, 37 Cal. 274.

People *vs.* Sanford. 43 Cal. 29.

People *vs.* Prospero, 44 Cal. 186.

People *vs.* Hersey, 53 Cal, 574.

To give an instruction from a book which might not be in the possession or accessible to the defendant or his counsel, and would not be filed in the case would be imposing a burden on the defendant not justified by law.

Sec. 315, Utah Code Crim Proc.

People *vs.* Ah Tong, 12 Cal. 345

The object of the statute: Sec 289, Utah Code Crim. Proc. was to give the defendant the benefit of the instructions. This can only be done by having them in such shape that the jury upon retiring for deliberation could take them with them, and by filing them so that defendant can get them before the appellate court in an authentic shape.

This was a right of defendant which he did not waive.

We think the instruction read by the court "from a book" did not properly declare the law of this case but as it is not in the record we cannot argue our objection to it.

We argue that if the court can read one instruction from a book, it can read them all from a book; and we submit that it would be a bad precedent for a jury on retiring to consider their verdict to take with them each one or more law books.

When written charges have been presented given or refused, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions; but they form a part of the record &c. Utah Code Crim. Proc. Sec. 315.

J. G. SUTHERLAND,
and LEE J. SHARP,
Counsel for Plaintiff in Error.

ATTORNEY GENERAL OF THE UNITED STATES,
for Defendant in Error.

SUPREME COURT U. S.
FILED
JAN 20 1882
JAMES H. McKENNEY, Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

HOPT,
vs.
THE PEOPLE OF UTAH. } No. 1112.

BRIEF FOR THE DEFENDANTS IN ERROR.

The statutes bearing upon the subject are as follows:

LAWS OF UTAH (1878).—"*Criminal procedure.*"

SEC. 223. When an indictment is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by affidavit, direct the trial to be postponed to another day of the same or of the next term.

SEC. 423–4. The process by which the attendance of witnesses before a court or magistrate is required is a subpœna; it may be signed and issued by ——

* * * * * * *

4. —— The clerk of the court in which an indictment is to be tried; and he must at any time, upon application of the defendant, and without charge, issue as many blank subpœnas, subscribed by him as clerk, for witnesses in the Territory as the defendant may require.

SEC. 113. When the magistrate or a judge of the court in which the action is pending is satisfied, by proof on oath, that there is reason to believe that any such witness will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance as specified in the preceding section.

SEC. 429. When a defendant has been held to answer a charge for a public offense he may, either before or after an indictment, have witnesses examined conditionally, on his behalf, as prescribed in this chapter, and not otherwise.

SEC. 430. When a material witness for the defendant is about to leave the Territory, or is so sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

SEC. 235. A challenge to an individual juror is either—

1. Peremptory; or
2. For cause.

SEC. 236. It must be taken when the juror appears, and before he is sworn to try the cause; but the court may for cause permit it to be taken after the juror is sworn, and before the jury is completed.

SEC. 242. A challenge for implied bias may be taken for all or any of the following causes, and for no other:

SUBDIVISION 8. Having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged.

SEC. 257. The jury having been impaneled and sworn, the trial must proceed in the following order:

SUBDIVISION 7. The judge must then charge the jury, if requested by either party; he may state the testimony and declare the law, but must not charge the jury in respect to matters of fact; and in each case he shall inform the jury that they are the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts; such charge must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally.

BRIEF.

The homicide in question occurred upon the 3d of July, 1880 (folio 40); the prisoner was arrested upon the 22d of the same month (folio 37), and directly afterwards was confined in the penitentiary, and has remained there ever since (folio 39). Upon the 17th of December, 1880, he was arraigned and pleaded not guilty; and thereupon declined to have the court appoint counsel for him. Upon the 24th of January, 1881, at his request counsel was so assigned. Motions for a *continuance* were made on the 9th of February, and the trial was had from the 16th to the 19th of the same month (folio 3). Judgment was *rendered* upon the 4th of April (folio 3), and upon the 23d of July, 1881, was *affirmed* by the supreme court of the Territory, one member of the court dissenting (folio 68).

The case therefore is that of a man who being charged with one of the highest crimes known to the law, *not only took none of the ordinary steps towards defending himself for more than seven months, but also at the end of more than five of those months declined to have the court appoint counsel for him.*

I submit that this imparts a general character of gross negligence to the plaintiff's conduct under the charge afterwards made good against him, and places everything that was subsequently done by the judge in dealing with the prisoner's application for a *continuance*, within the sphere of judicial *discretion*, or, in other words, prevents that dealing from being proper subject-matter for an assignment of error.

The law and circumstances of the case gave to the plaintiff in error seven months for preparation. That these although spent in confinement, afforded ample opportunity for developing his defense, is not only a presumption of that law, which whilst it *allows no bail* at the same time *demands preparation* of all such prisoners, but is shown *here* where, the imprisonment still continuing, able and energetic counsel were appointed who have fully performed every professional duty that devolved upon them.

At every step in the assignments of error in regard to *continuance*, the record suggests that it is only because of the neglect of the plaintiff in error that the fullest opportunity has not been given to his counsel to do all that could have been suggested in behalf of their client.

The *assignments* of error are upon folio 73, &c., of the record. The *instructions* given to the jury by the court, as well as its dealing with the *requests* of the plaintiff in error, are to be found upon folios 5 to 24; *not within the bill of exceptions;* which begins upon folio 26. The affidavits for continuance are upon folios 27 to 42.

The affidavits, which are entitled *in both of the names* borne by the prisoner, state in brief that he had declined to have counsel assigned because he was expecting his father (who resided in New Ulm, Minn., and who he had found, by correspondence "previous" to such refusal, was absent in Oregon) to arrive at Salt Lake City with means to employ counsel; that he had written to Oregon but has not heard from his father, and believes that he had changed his address; but "is satisfied that when his father hears of his condition he will hasten to his relief with sufficient means to employ counsel and to pre-

pare for his defense"; that at the time of the homicide he was grossly intoxicated, and for a long time anterior was so habituated to the use of alcoholic liquors as to be habitually insane; that he cannot proceed safely to trial for the absence of *William Root*, *Willie Johnson*, *Peter May*, and others whose names he does not recollect, but thinks that if time is afforded him he can ascertain them; that their residence is unknown to him, but he believes them to be still within Utah; that he expects to prove by them that each of them separately, and not in conjunction with others, saw him grossly intoxicated on the day of the murder, and that he was previously so habituated to the use of spirits as to be habitually insane, and was insane at time of murder; that he could prove these facts by nobody else.

The second affidavit differs from the first in substituting amongst the names of the witnesses that of *James Lane* for those of *Johnson* and *Root* in the former; and in being more specific as to their probable places of abode.

As for the absence of his father, it does not appear when he began to write for him, except that it was before the 17th of December; nor that it is in law matter of substance whether a person charged with crime should be defended by counsel *retained* rather than by counsel *appointed*. The prisoner was of full age, and the absence of a relative who might have taken part in the defense was not a substantial incumbrance upon such defense, especially as he willfully rejected those special means which the law regards as important, and which therefore generally are guarantied by constitutional provisions to parties charged with crime.

So, for the *witnesses;* the prisoner had declined to put in motion that machinery which would have resulted in

a timely and diligent inquiry for them. It was gross negligence, especially in a frontier and changing community, to throw away more than six of the seven months which were at his command, and it is inadmissible to countervail such negligence by affidavits which, so far as believed, merely aggravate one's impression of it.

Again, the affidavits do not show what was done constituting the "all reasonable diligence" alleged. (Grant's Case, 23 Cal., 158; Quincy's Case, 8 Cal., 89; 14 Cal., 420.)

The fact to be proved by the absent witnesses was of such a nature as to discredit the allegation that it could not be established by *others*. (Thompson's Case, 4 Cal., 240; Mortimer's Case, 46 Cal., 114.)

It is therefore submitted that there is nothing in the record to remove the matter of the affidavits from that sphere of judicial *discretion* to which, by presumption of law, it would belong.

This remark applies to *assignments* numbered 1 and 2.

3. As the juror *Schade* said that his opinion as to the guilt of the prisoner was a *qualified* one, and that he would render a verdict according to the evidence (folio 45), it seems that, under subdivision 8 of section 242 of the Criminal Code of Procedure of Utah, quoted above, he was competent. (See, also, Reynolds' Case, 98 U. S., 156.)

4. The prosecution, not having exhausted its peremptory challenges (p. 15), could exercise such challenge at any time before the juror had been sworn to try the case. (Lindsley's Case, 6 Park, 233; Tweed's Case,

13 Abb. Prac., N. S., 371; McCarty's Case, 48 Cal., 557; People *vs.* Ah Yon, 47 Cal., 121; Montgomery's Case, 53 Cal., 576; §§ 235 and 236, Crim. practice act, above.)

5. *Assignment* 5 is to the admission of testimony of a confession. One Carr followed the witness as a casual spectator while he was being taken to jail. The examination of Carr shows that the confession was made voluntarily. Courts will not presume a confession to have been induced by hope or fear. (Row's Case, Russel & Ryan C. C., 153; 1 Carrington & Payne, 98, note; 1 Greenleaf Ev., § 223.)

6. As to assignments numbered 6, 7, 9, and 11, it seems to be sufficient to say that *they are not contained in the bill of exceptions.* (Thompson *v.* Riggs, 5 Wall., 663; Young *v.* Martin, 8 ib., 354.

If it should be suggested that the *charge*, and the different *refusals*, &c., upon folios 5 to 23 inclusive, *being signed* [*perhaps*] *by the judge*, may be taken as covered by what are virtually *bills of exceptions*, even although the formal *bill* begins upon folios 26; another objection to making this action by the court ground of error is, that *no part of it appears to have been duly excepted to.*

7. *Assignment* 10 is, that the judge did not reduce one of his instructions to *writing*, but read it from the American Law Register, p. 559.

In the presence of a statutory requirement, such as § 257, subdivision 7, above, it is, of course, erroneous to deliver *oral* instructions. But as it seems that the only object of the requirement must be to secure to the prisoner the benefit the exact words in which the jury received the law, and as this object is equally well attained